O'Hare Knightsbridge d/b/a Sheraton O'Hare Hotel *and* International Union of Operating Engineers, Local 399, AFL-CIO. Case 13-CA-21470

February 3, 1982

DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

Upon a charge filed on August 27, 1981, by International Union of Operating Engineers, Local 399, AFL-CIO, herein called the Union, and duly served on O'Hare Knightsbridge d/b/a Sheraton O'Hare Hotel, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 13, issued a complaint on September 8, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on July 27, 1981, following a Board election in Case 13-RC-15594, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about August 25, 1981, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On September 17, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On September 28, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on October 1, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint and response to the Notice To Show Cause, Respondent attacks the validity of the election and certification and the validity of the Hearing Officer's Report on Objections on the ground that Respondent's exceptions to the Hearing Officer's Report on Objections should have been sustained and that the Board's adoption of the Hearing Officer's findings was improper. Specifically, Respondent contends that the Hearing Officer's crediting of the Union's organizer was erroneous; that even if such witness is credited, his admitted electioneering by the polling area violated the Board's rule against electioneering; and that Respondent's due process right to a fair hearing was violated by the Hearing Officer's limitation of Respondent's right to elicit relevant testimony from the Board agent. The General Counsel, on the other hand, argues that Respondent is merely attempting to relitigate those issues which were litigated in the underlying representation proceeding in Case 13-RC-15594, which may not be relitigated herein. We agree with the General Counsel.

Our review of the record herein reflects that, pursuant to a Stipulation for Certification Upon Consent Election, an election was conducted on December 5, 1980. The tally of ballots showed that of approximately 11 eligible voters 10 cast ballots, of which 9 were for, and 3 were against, the Union; 1 was challenged. Respondent filed objections to the conduct of the election.[2] After investigating the issues raised by the objections, the Acting Regional Director issued his Report on Objections in which he recommended that a hearing be held to resolve the credibility issues raised in the investigation of the objections. The hearing was held before Hearing Officer William V. Killoran, Jr., on January 19 and February 12, 1981.

[1] Official notice is taken of the record in the representation proceeding, Case 13-RC-15594, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co.* v. *Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

[2] Respondent's objections asserted that the election was held in split sessions; a nonemployee representative engaged in electioneering with employees waiting to cast votes; electioneering took place within 40 to 60 feet of the polling place and all voters had to pass through an area where a union representative was stationed in order to gain access to the polling place; that under the rule in *Milchem, Inc.*, 170 NLRB 362 (1968), the actions of the union representative constitute objectionable conduct; and, by such conduct, the Union destroyed the laboratory conditions necessary for a fair election.

During the hearing, Respondent asked for and received the Board's consent to permit Board Agent Ramon Martinez to testify pursuant to a subpena issued on the same date. On January 21, 1981, Respondent made a motion to admit documents and continue hearing until the disposition of the subpena Respondent served on Board Agent Ramon Martinez. On February 5, 1981, the General Counsel, by telegram, granted Respondent's request to permit Board Agent Martinez to testify solely with respect to what conversations, if any, he had with the parties to the election concerning the scope of the permissible electioneering. On February 9, 1981, the Hearing Officer issued his order reopening the hearing, receiving documents into evidence, and rescheduling the hearing. On March 18, 1981, the Hearing Officer issued his Report on Objections in which he recommended that Respondent's objections be overruled and that a certification of representative issue. Thereafter, Respondent filed exceptions to the Hearing Officer's Report on Objections, and the Union filed a response to Respondent's exceptions.

On July 27, 1981, the Board issued its Decision and Certification of Representative in which, after consideration of the Hearing Officer's report and Respondent's exceptions and brief, it adopted the Hearing Officer's findings and recommendations overruling Respondent's objections with respect to alleged electioneering and comments concerning electioneering by Board Agent Ramon Martinez. The Board also noted in footnote 1 of its Decision that the parties had agreed to which particular individuals would be eligible to vote through the use of a *Norris-Thermador Corp.* list.[3] Moreover, the Board indicated in footnote 2 that there was insufficient basis for disturbing the Hearing Officer's credibility resolutions in the case.

On August 11, 1981, the Union, by letter to Respondent's counsel, requested that it be advised as to whether or not Respondent was prepared to commence negotiations or wished to pursue its objections by refusing to bargain. By letter dated August 25, 1981, Respondent stated in pertinent part, ". . . I must inform you that we respectfully decline your offer to bargain inasmuch as we believe, for the reasons stated in our objections to certification, that the N.L.R.B. improperly certified Local 399. Accordingly, O'Hare Knightsbridge declines your offer to bargain until such time as the Board's Order is judicially enforced." Thereafter, on August 27, 1981, the Union filed the instant unfair labor practice charge.

We find no merit to Respondent's contentions inasmuch as it appears that Repondent is merely reiterating the issues previously raised and considered in the underlying representation case. We still find, and thereby reaffirm our previous determination, that Respondent's allegations, which deal primarily with credibility issues, constitute an insufficient basis for disturbing the Hearing Officer's credibility resolutions in this case.

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[5] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, an Illinois partnership, is engaged in the hotel accommodation business and has maintained a facility located at 6810 Mannheim Road, Rosemont, Illinois. During the past fiscal or calendar year, a representative period, Respondent in the course and conduct of its operations had gross revenues in excess of $500,000 and, during the same period, it purchased and received at its facility goods and materials valued in excess of $5,000 directly from points located outside the State of Illinois.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

[3] 119 NLRB 1301 (1958).

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] Moreover, as previously noted, Respondent's response to the Union's bargaining demand indicated that the Board improperly certified the Union and that Respondent declined to bargain until such time as the Board's Order is judicially enforced.

II. THE LABOR ORGANIZATION INVOLVED

International Union of Operating Engineers, Local 399, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All maintenance employees employed at the Employer's facility presently located at 6810 Mannheim Road, Rosemont, Illinois but excluding all other employees, including guards and supervisors as defined in the Act.

2. The certification

On December 5, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 13 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on July 27, 1981, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about August 11, 1981, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about August 25, 1981, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since August 25, 1981, and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. O'Hare Knightsbridge d/b/a Sheraton O'Hare Hotel is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. International Union of Operating Engineers, Local 399, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All maintenance employees employed at the Employer's facility presently located at 6810 Mannheim Road, Rosemont, Illinois, but excluding all other employees, including guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since July 27, 1981, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective

bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about August 25, 1981, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, O'Hare Knightsbridge d/b/a Sheraton O'Hare Hotel, Rosemont, Illinois, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 399, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All maintenance employees employed at the Employer's facility presently located at 6810 Mannheim Road, Rosemont, Illinois but excluding all other employees, including guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Rosemont, Illinois, facility copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 13, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with International Union of Operating Engineers, Local 399, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All maintenance employees employed at the Employer's facility presently located at 6810 Mannheim Road, Rosemont, Illinois but excluding all other employees, including guards and supervisors as defined in the Act.

O'HARE KNIGHTSBRIDGE D/B/A
SHERATON O'HARE HOTEL